



REPUBLIC OF KENYA
IN THE COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 623 OF 2015

GOVINDA & SONS (K) LIMITED.....APPELLANT/APPLICANT

Versus

LUCKY OUMA OKONG'O.....RESPONDENT

RULING

1. Govinda & Sons (K) Ltd, the applicant herein took out the motion dated 4th April, 2016 in which it sought for the following orders:-

- i. That the application be certified urgent and heard ex-parte in the first instance.***
- ii. That there be a stay of execution of the judgment and decree delivered in cmcc 4175 of 2012 on 11th December, 2015 pending the hearing and determination of this application.***
- iii. That there be a stay of execution of the judgment and decree in cmcc 4175 of 2012 on 11th December, 2015 pending the hearing and determination of this Appeal.***
- iv. That the costs of the application be provided for.***

2. When the motion came up for interparties hearing, learned counsels appearing in the matter recorded a consent order to have the matter disposed of by written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support of the application and grounds of opposition as filed by the Respondent.

3. The Applicant avers that the judgment in the lower court was delivered on 11th December, 2015 in favour of the Respondent who was awarded the sum of Kshs. 152,000/- together with costs of the suit plus interest thereon. It argues that, the lower court granted an order for stay on condition that half of the decretal sum be paid to the Respondent advocates and the balance be deposited in a joint interest earning account. However, he now claims that the orders will result in substantial loss rendering the appeal nugatory since the Respondent's financial standing and assets are unknown to the appellant as a result of which, it may not be able to recover the monies paid to the Respondent should the Appeal succeed. The Applicant avers that it is ready to furnish security by depositing a bank guarantee for the entire decretal sum. The applicant claims it is apprehensive that it will be exposed to execution proceedings since the order for stay of execution lapsed on 5th April, 2016 unless this court exercises its discretion and grants the orders sought.

4. The Respondent in response contends that the amount involved is a minimal figure of Kshs. 152,000/= and concurs that the Applicant was ordered by the lower court to deposit a sum of Kshs. 71,000/= to the

Respondents' Advocate and to deposit the balance of Kshs. 71,000/= in a joint interest earning account. He avers that the Applicant has not shown that the Respondent is a pauper who will not be able to refund Kshs. 71,000/- should the appeal succeed. He argued that, the Applicant is shifting the burden of proof from itself to the Respondent which burden is always borne by he who alleges. He asserts that the Respondent is able to pay minimal sum of Kshs. 71,000/-. He claimed that the Applicant has not shown it will suffer substantial loss and that the Respondent will not be able to refund the sum. He further asserts that the Applicant did not show a sign of good faith and deposit the other half of the decretal sum in a joint account. The Respondent further disputed the proposal to give a bank guarantee and claimed that the Applicant is not financially stable hence his proposal to deposit a bank guarantee instead of cash.

5. I have considered the arguments by the parties. Where parties seek for orders of stay of execution, order 42 Rule 6 comes to play which order clearly lays down the principles to be considered before granting the orders for stay. In particular, the Applicant is expected to show that he will suffer substantial loss should the orders fail to issue. The Applicant is also expected to have brought the application without undue delay and he has to offer to deposit security.

6. I have perused the application by the Applicant and his submissions. It is apparent that the lower court had directed the Applicant to pay half of the decretal sum amount of Kshs. 71,000/= to the Respondent and the remaining Kshs. 71,000/= be deposited in joint interest earning account in the name of the two advocates representing the parties in this suit. The Applicant has not shown how he will suffer substantial loss to the satisfaction of this court. He merely claims that the Respondent will not be able to refund the decretal sum, but has not advanced reasons for this belief. The Respondent is adamant that he is not a pauper and could very well refund the Kshs. 71,000/- should the appeal succeed. I am not convinced that the Respondent is not a man of means. I am further not convinced that the Applicant will suffer substantial loss and I am not inclined to review of the orders of lower court directing the Applicant to deposit half of the decretal sum of Kshs. 71,000/= in a joint interest earning account in the names of both advocates representing the parties in this suit and the remaining Kshs. 71,000/- be paid to the Respondent.

7. In the end, I dismiss the application and uphold the decision of the Lower Court. Costs of the application to abide to the outcome of the Appeal.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent